No. 89-1293

In the Supreme Court of the United States

OCTOBER TERM, 1989

W.C. GARCIA & ASSOCIATES, INC., PETITIONER

v.

FRANK S. MICELI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's claim for injunctive relief to restrain respondent from collecting a tax assessment was correctly dismissed as moot because the IRS had abated the assessment.

2. Whether petitioner's request for an order directing respondent to "return" petitioner's payment of another assessment was correctly denied on the ground that the jurisdictional prerequisites of a suit for refund had not been met.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 889 F.2d 1097 (Table). The order of the district court (Pet. App. 4a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1989. The petition for a writ of certiorari was filed on February 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is the second suit brought by petitioner with respect to its personal holding company tax liability for 1975.[1] In 1984 petitioner brought suit in the United States District Court for the Northern District of California against an Internal Revenue Service (IRS) District Director, seeking preliminary and permanent injunctive relief to restrain the collection of a personal holding company tax assessment of $82,834. Petitioner alleged that the assessment was invalid and must be enjoined because the IRS had failed to send a notice of deficiency as required by Sections 6212 and 6213 of the Code.[2] The government disputed that the assessment violated those provisions. It contended that petitioner had executed a waiver of the restrictions on assess-

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[1] The personal holding company tax is a surtax imposed by Section 541 of the Internal Revenue Code (26 U.S.C.) on the passive income of certain closely held corporations.

[2] The Anti-Injunction Act (26 U.S.C. 7421(a)) generally bars suits to enjoin the assessment or collection of taxes. See *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974); *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). But the Act is subject to several exceptions, including the exception provided in Section 6213(a) of the Code. Section 6213(a) establishes a "Restriction on Assessment" of taxes, which generally precludes the IRS from assessing or attempting to collect an income tax until it has mailed a notice of deficiency to the taxpayer in accordance with Section 6212, and for 90 days thereafter. If the taxpayer files a petition with the Tax Court during the 90-day period, the stay upon assessment and collection continues until the decision of the Tax Court becomes final. The stay is designed to permit a taxpayer to pursue prepayment litigation in the Tax Court. See *Flora* v. *United States*, 362 U.S. 145, 158-163 (1960). If the IRS makes an assessment that violates Section 6213(a), or institutes a levy or proceeding in court seeking to collect such an assessment, then "[n]otwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time

ment imposed by Section 6213 (see 26 U.S.C. 6213(d)), so that a notice of deficiency was not required. See CR 9, Exh. B.[3]

The district court denied petitioner's request for a preliminary injunction, and granted the government's motion for summary judgment (CR 9, Exhs. B, C, D). Petitioner appealed, but while the appeal was pending, petitioner paid the assessment in full without seeking a stay of the district court's judgment. The court of appeals thereafter granted the government's motion to dismiss the appeal as moot (CR 9, Exh. E). The court explained that, the entire tax having been paid, petitioner's "appeal from the dismissal of its action for an injunction against the collection of taxes is therefore moot" (*ibid.*). This Court denied certiorari. 475 U.S. 1010 (1986).

2. The IRS thereafter made a second assessment of approximately $3,000 with respect to petitioner's personal holding company tax for 1975 (see CR 15, Exh. A). When the IRS sought to collect that assessment, petitioner filed this suit in the same district court against respondent, the IRS District Director. The complaint described the action as one to enjoin the collection of tax, invoking jurisdiction under Section 6213 of the Code (CR 1, at 1). It asserted that both the first assessment (which petitioner had paid) and the second assessment (which petitioner had not paid) were in violation of Section 6213 because the IRS had not issued a notice of deficiency to petitioner before making

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[the] prohibition [of Section 6213(a)] is in force may be enjoined by a proceeding in the proper court" (26 U.S.C. 6213(a)). See *Laing* v. *United States*, 423 U.S. 161, 184 & n.27 (1976).

[3] "CR" refers to the docket control numbers assigned to the documents in the original record by the clerk of the district court.

either assessment (CR 1, at 2-4). The complaint requested that respondent (1) "be enjoined and restrained from taking any action to collect or otherwise enforce" the assessments, and (2) "be ordered to return" to petitioner any part of the assessments that had already been collected (*id.* at 4). Although requesting the return of these funds, the complaint did not invoke the statutes that provide jurisdiction over a tax refund suit nor did it allege the precondition for such a suit – namely, that petitioner had filed an administrative claim for refund of the tax paid.[4]

While this suit was pending in the district court, the IRS abated the second assessment. A declaration executed on May 25, 1988, by an IRS employee who had custody of records relating to petitioner averred that the assessment was abated as erroneous because the IRS had determined that petitioner's tax liability for 1975 had been paid in full. The declaration further stated that all liens and levies arising from that assessment had been released or would be released forthwith, and that no further collection activity

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[4] 28 U.S.C. 1346(a)(1) provides a district court with jurisdiction over a "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." Tracking the language of that statute, Section 7422(a) of the Code limits a taxpayer's right to bring a refund suit by specifying that:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary [of the Treasury], according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

would be undertaken regarding petitioner's 1975 income taxes. Pet. App. 5a; CR 21. Petitioner adduced nothing to contradict the representations in that declaration.

On cross-motions for summary judgment, the district court entered judgment for the government (Pet. App. 4a-7a). The court held that petitioner's claim to restrain the collection of tax was moot, because the unpaid assessment had been abated and the IRS had agreed that petitioner's tax liability for 1975 had been paid in full. The court rejected petitioner's arguments that there remained a justiciable controversy respecting the validity of that assessment. The court observed that "[f]ailure to provide a deficiency notice in violation of 26 U.S.C. § 6212(a) is not a case within a class normally incapable of appellate review because of the lapse of time" (*id.* at 6a). The court stated that "[t]here is no evidence that an assessment is likely to occur again, let alone an assessment in violation of section 6212(a)" (*ibid.*).

The district court further ruled that petitioner was not entitled to injunctive relief directing the IRS to "return" the taxes that had been paid in response to the first assessment (Pet. App. 6a). The court explained that the appropriate procedural channel for seeking recovery of a tax is a refund suit. The court stated that the present action could not be maintained as a tax refund suit because the jurisdictional requirements for such a suit were not met, *i.e.*, petitioner "has not brought this action under section 7422(a) nor has [petitioner] made the necessary allegations to state a section 7422(a) claim" (*ibid.*). The court concluded that petitioner "cannot use these proceedings in lieu of an action for refund and avoid its jurisdictional prerequisites under 26 U.S.C. § 7422(a)" (*ibid.*).

3. The court of appeals affirmed by unpublished order (Pet. App. 1a-3a). The court agreed with the district court that petitioner's claim to restrain the collection of the

unpaid assessment "was rendered moot by the IRS's decision to abate the assessment and to release all liens" (*id.* at 2a). The court observed that, although the IRS had made two assessments against petitioner without mailing a notice of deficiency, "there has been no showing that the event will likely occur again" (*ibid.*). Citing its prior decision in *Cool Fuel, Inc.* v. *Connett*, 685 F.2d 309 (9th Cir. 1982), the court further stated that, even if the controversy were not moot, petitioner would not be entitled to injunctive relief because it had not demonstrated irreparable injury and that it could not pursue an adequate remedy at law (Pet. App. 2a). The court of appeals also agreed with the district court that, although petitioner could have brought a refund suit under 26 U.S.C. 7422 to try to recover the funds paid in response to the first assessment, petitioner could not "seek such a refund in this action and thereby avoid the jurisdictional prerequisites of section 7422(a)" (*ibid.*).[3]

ARGUMENT

1. The courts below correctly ruled that petitioner's claim to enjoin the collection of the unpaid tax assessment was moot, and that determination raises no issue warranting review by this Court. The uncontroverted declaration of an IRS employee established that the IRS had abated that assessment and would make no further effort to collect it (Pet. App. 5a; CR 21). There is no reason to adjudicate the validity of a tax assessment that has been abated, and we are aware of no case that has done so. Under the limitations imposed by Article III of the Constitution, it is the duty of a federal court "to decide actual controver-

[3] The court also rejected petitioner's claim for litigation costs under Section 7430 of the Code, stating that petitioner had not shown "that the government's position throughout these proceedings was not substantially justified" (Pet. App. 2a-3a).

sies by a judgment which can be carried into effect, and not to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653 (1895). The IRS's abatement of the assessment has already given petitioner the relief that it would obtain if collection of that assessment were enjoined; accordingly, there remains no live Article III "case[ ]" or "controvers[y]" over whether the assessment was valid when issued. To adjudicate that question now would be to render an advisory opinion in violation of the constitutional limitations on the authority of the federal courts. See, *e.g.*, *Hall* v. *Beals*, 396 U.S. 45, 48 (1969).

Petitioner argues (Pet. 20-23) that the question whether the tax assessment violated the procedural requirements of 26 U.S.C. 6212 and 6213 is not moot, on the theory that the assessment is an act "capable of repetition, yet evading review." The courts below correctly rejected that argument. The phrase "capable of repetition" connotes "a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Petitioner presented nothing to contradict the IRS's declaration that the assessment had been permanently cancelled and would not be revived, and thus the courts below correctly stated that "there has been no showing that the event will likely occur again" (Pet. App. 2a; see *id.* at 6a).[6]

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[6] Petitioner suggests (Pet. 20, 23) that a future invalid assessment is likely because the IRS has twice made assessments against petitioner without issuing a notice of deficiency. This suggestion is misconceived. The IRS denied that there was any procedural defect in the first assessment, because petitioner had waived its right to a notice of deficiency. The district court declined to enjoin collection, and the court of appeals' consideration of petitioner's objections was mooted by petitioner's

Moreover, the making of a tax assessment is clearly not an action of such inherently short duration or effect that it must "evad[e] review." To the contrary, there are many cases addressed to the question whether the IRS complied with the deficiency procedures of Sections 6212 and 6213 in making a tax assessment. See, *e.g.*, *King* v. *Commissioner*, 857 F.2d 676 (9th Cir. 1988); *Mulder* v. *Commissioner*, 855 F.2d 208 (5th Cir. 1988) (deficiency notice not mailed to "last known address" as required by Section 6212). Thus, the district court correctly observed that "[f]ailure to provide a deficiency notice in violation of 26 U.S.C. § 6212(a) is not a case within a class normally incapable of appellate review because of the lapse of time" (Pet. App. 6a). The only reason that petitioner's objection here "evad[ed] review" was because the IRS determined that the assessment was erroneous and abated it on its own without the need for the district court to consider whether to order such relief.[7]

2. There is no merit to petitioner's contention (Pet. 19-20) that the courts below erred in failing to order respondent to "return" the taxes paid in response to the first assessment. Such a claim is not cognizable under Section 6213. That statute provides authority in certain cir-

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payment of the assessed amount. The IRS concluded that the second assessment, however, was erroneous because petitioner did not owe any more tax. In the two years since that assessment was abated and the IRS averred that it would not commence any further collection efforts because it regarded the 1975 liability as fully paid, petitioner has been given no reason to doubt that the IRS will adhere to that representation.

[7] Because petitioner's claim to enjoin collection of the assessment is moot, this Court has no occasion to consider the issue to which petitioner devotes most of its attention (Pet. 7-18)—namely, whether the Ninth Circuit correctly held in *Cool Fuel, Inc.* v. *Connett*, 685 F.2d 309 (1982), that such a request for injunctive relief should be granted only if the plaintiff demonstrates irreparable injury and that there is no adequate remedy at law.

cumstances for a court to enjoin the IRS from making a premature assessment or from beginning a levy or collection action to enforce such an assessment. See note 2, *supra*. It does not provide jurisdiction, however, over a claim to recover taxes that have already been paid. The correct procedure for pursuing such a claim is in a refund suit, after the taxpayer duly files an administrative claim for refund of the tax and meets other jurisdictional requirements. See note 4, *supra*.

Section 7422(a) unequivocally states that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Secretary [of the Treasury], according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." See, *e.g.*, *United States* v. *Dalm*, 110 S. Ct. 1361 (1990); *Little People's School, Inc.* v. *United States*, 842 F.2d 570, 573 (1st Cir. 1988). Here, petitioner is seeking to "recover[ ] [a] * * * tax alleged to have been erroneously or illegally assessed" (26 U.S.C. 7422(a)), and therefore the courts below correctly ruled that it cannot maintain this suit "in lieu of an action for refund and avoid its jurisdictional prerequisites under 26 U.S.C § 7422(a)" (Pet. App. 6a; see *id.* at 2a).[6]

[6] Petitioner elected to discharge its liability for the first tax assessment during its appeal from the district court's dismissal of its first suit for injunctive relief under Section 6213, thereby mooting the appeal. Petitioner cannot revive that injunctive action merely by appending to its present complaint against the second assessment a claim for the "return" of the tax previously paid. Rather, its post-payment remedy for any defect in the first assessment was a timely refund suit, which it did not undertake.

This suit clearly fails to meet the jurisdictional prerequisites of an action for refund. Petitioner's complaint was brought for injunctive relief under Section 6213 against an officer of the IRS. The complaint invoked none of the statutes that provide subject matter jurisdiction over a refund suit, and it made no allegation that petitioner had duly filed with the IRS an administrative claim for refund of the tax paid. As the district court observed, petitioner "has not brought this action under section 7422(a) nor has [petitioner] made the necessary allegations to state a section 7422(a) claim" (Pet. App. 6a). Thus, the court lacked jurisdiction to award petitioner a refund of the tax that it paid in response to the first assessment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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